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No. 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

DON H. REUBEN,
LAWRENCE GUNNELS,
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
130 E. Randolph Drive,
Chicago, Illinois 60601,

HAROLD R. MEDINA, JR., ESQ.,
CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York, N. Y. 10005,

Attorneys for Petitioner.

THE SUPREME COURT PRINTING COMPANY, CHICAGO

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We respectfully submit that Pape's brief fails to advance any persuasive reasons or relevant authorities in support of the judgment of the Seventh Circuit.

I. PAPE'S CONFUSION OF THE RIGHT OF PRIVACY AND PUBLIC OFFICIAL LIBEL SUITS.

Pape argues that the right of privacy is as important, if not more so, than First Amendment rights of free public discussion and debate. (Pape's Br. pp. 15, 17-19.) Citing Warren and Brandeis' classic 1890 article, *The Right of Privacy* (4 Harv. L. Rev. 193), Pape argues that too many "ordinary citizens" find themselves "thrust into the public

limelight" by the news media and that their only protection is through the laws of slander and libel.[1] (*Id.* at pp. 18-19.)

The fallacy of Pape's right of privacy argument is twofold:

> *First:* Pape is a public official suing for libel (not invasion of privacy) and must prove that Time is guilty of actual malice under the *New York Times* doctrine. Any reliance by Pape upon the privacy rights of "ordinary citizens" is merely a disguised claim that he is not in fact a public official within the meaning of *New York Times* (as he repeatedly and unsuccessfully argued throughout the lower court proceedings).
>
> *Second:* Even if Pape were an ordinary citizen and this were a suit for invasion of privacy, his constitutional burden would be the same—to prove that Time published with actual malice within the meaning of *New York Times*. The decision of this Court in *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), held the *New York Times* standard of actual malice applicable to suits for invasion of privacy when the subject of the publication is a matter of public concern. (385 U. S. at 388-89.)

We submit that Pape's strained argument concerning the "right of privacy" is in reality a confession that he cannot defend or support with any authority the Seventh Circuit's marked departure from *New York Times* and its progeny.

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1. Warren and Brandeis did not contend that protection of the right of privacy is through the laws of slander and libel. They urged that the courts recognize an entirely new tort, *i.e.*, the unwarranted invasion of privacy, to provide redress in cases where common law concepts of defamation did not do so. See Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

II. PAPE HAS CITED NO CASES THAT SUPPORT HIS POSITION.

None of the cases cited in Pape's brief hold or imply that a submissible jury question of *New York Times* actual malice is established by evidence comparable to that adduced at the trial below:

Ashton v. *Commonwealth*, 405 S. W. 2d 562 (Ky. 1965). This decision of the Kentucky Court of Appeals, cited and discussed in Pape's brief at pp. 21-22, was reversed by this Court in *Ashton* v. *Kentucky*, 384 U. S. 195 (1966). The case involved a prosecution for criminal libel; this Court held the Kentucky criminal libel statute unconstitutional.

Gilligan v. *King*, 48 Misc. 2d 212, 264 N. Y. S. 2d 309 (1965) (Pape's Br. pp. 22-23). The only issue decided by the New York Supreme Court was whether the complaint stated a cause of action in light of *New York Times*. In marked contrast to the *Time* article here, the alleged libel in *Gilligan* was a poster reproducing a picture of the plaintiff, a police officer, and the false words "Wanted For Murder" above it.

Coursey v. *Greater Niles Township Pub. Corp.*, 40 Ill. 2d 257, 239 N. E. 2d 837 (1968) (Pape's Br. p. 23). As in the *Gilligan* case, *supra*, the only issue decided by the court was whether the complaint sufficiently pleaded that the alleged libel was published with actual malice. The plaintiff, a village police patrolman, claimed libel from an article stating that he had been found guilty of making immoral suggestions to a teenage girl.

Tucker v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1964) (Pape's Br. pp. 23-24). The Kentucky Court of Appeals held in this case that the plaintiff, a Louisville

policeman, was not required to prove actual malice under *New York Times*, and that the alleged libel was not qualifiedly privileged.[2]

Skain v. *Weldon*, 422 S. W. 2d 271 (Mo. 1967) (Pape's Br. pp. 25-26). The Missouri Supreme Court, in reversing a judgment for the defendant publisher because of improper jury instructions, stated that actual malice is equivalent to "*a wrong motive . . . the presence of an improper motive.*" (422 S. W. 2d at 275; emphasis in original.) This Court rejected such a concept in *Henry* v. *Collins*, 380 U. S. 356, 357 (1965), holding that motive, or "intent to inflict harm" does not constitute actual malice under *New York Times*; there must be "intent to inflict harm through falsehood."

Fox v. *Kahn*, 421 Pa. 563, 221 A. 2d 181 (1966) (Pape's Br. p. 27). The alleged libel here was that the plaintiff, a District Attorney, had placed an accused person in a room alone and beat a confession out of him with a telephone book. At the trial, the defendant squarely admitted that he *knew* the plaintiff did not administer the alleged beating nor order it to be done. The Supreme Court of Pennsylvania held that actual malice had been proven because of the defendant's flat admission of subjective knowledge of falsity.

Spahn v. *Julian Messner, Inc.*, 21 N. Y. 2d 124, 233 N. E. 2d 840 (1967) (Pape's Br. pp. 27-28). This was a suit for invasion of privacy brought by baseball pitching star Warren Spahn on the basis of a fictionalized biography. The biography contained gross errors of fact, "all-pervasive distortions, inaccuracies, in-

2. The *Tucker* case was decided shortly after this Court's decision in the *New York Times* case. The defendant in *Tucker* did not seek review of the decision by this Court.

vented dialogue and the narration of happenings out of context." (233 N. E. 2d at 842.)

Varnish v. *Best Medium Pub. Co.*, 405 F. 2d 608 (2nd Cir. 1968) (Pape's Br. pp. 28-29). This was another invasion of privacy action. The plaintiff's wife had killed their three children and committed suicide; the article in question was a sensationalized version of the tragedy in the weekly tabloid, *National Enquirer*. As in the *Fox* case, *supra*, the author admitted that he deliberately falsified the story.

Goldwater v. *Ginzburg*, 414 F. 2d 324 (2nd Cir. 1969) (Pape's Br. pp. 30-31). Senator Barry M. Goldwater in this action recovered $75,000 in punitive damages against Ralph Ginzburg and Fact Magazine for two poisonous articles published during the 1964 election campaign; Ginzburg's articles repeatedly called Goldwater a "paranoid" and compared him to Hitler. Ginzburg had purported to conduct a "poll" of psychiatrists by mail but the results were deliberately slanted and colored by omissions and distortions. Moreover, reputable psychiatrists and psychiatric associations wrote to Ginzburg during the poll denying its validity.

The Second Circuit in affirming the judgment against Ginzburg found sufficient evidence of actual malice in Ginzburg's "predetermined and preconceived plan to malign the Senator's character" through falsehood. (414 F. 2d at 337.) There is no such evidence in the case at bar; the approach and attitude of the author and researcher of the *Time* article were in total contrast to Ginzburg's. Moreover, the *Time* article was written concerning the official annual report of the U. S. Commission on Civil Rights; the report recommended remedial civil rights legislation to the Presi-

dent and Congress on the basis of enumerated episodes of nationwide police brutality.

Mahnke v. *Northwest Publications, Inc.*, 280 Minn. 328, 160 N. W. 2d 1 (1968) (Pape's Br. pp. 38-41). The defendant newspaper printed an article reporting the false and unverified statements of a priest to the effect that the plaintiff, a Minneapolis police detective, had refused to arrest a man that had sexually molested his six year-old daughter. The story was given front page, banner headline treatment. Although six days elapsed between the event in question and publication of the article, the reporter did not contact the plaintiff to obtain his version; in fact, no effort whatsoever was made to check or corroborate the contents of the article prior to publication. Also, the plaintiff's demand for a retraction of the article was refused.[3]

In sum, none of Pape's cited authorities substantiate the judgment below. The decision of the Seventh Circuit, we submit, is totally insupportable and is in fact a throwback to pre-*New York Times* common law concepts of libel and presumption of malice without proof. We respectfully urge reversal.

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3. Moreover, the correctness of the decision is questionable at best. While the decision may possibly be justified on the singular ground (not present in this case) that the defendant, as in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), had knowledge of facts indicating that the story was false, a more likely interpretation is—as the dissenting opinion pointed out—that the court erroneously found proof of recklessness from: (1) the nature of the defamatory article, contrary to the teachings of *New York Times*, 376 U. S. at p. 273, (2) failure to investigate, contrary to the teachings of *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), and (3) failure to retract, contrary to the teachings of *New York Times*, 376 U. S. at p. 286.

III. PAPE'S BRIEF FAILS TO REFUTE PETITIONER'S ARGUMENTS AND AUTHORITIES.

Pape's brief does not attempt to distinguish any of the cases cited and discussed in our main brief. Most significantly, Pape fails to distinguish or even discuss the cases under *New York Times* that define the constitutional requirements of proof for submission of the issue of actual malice to the jury. *E.g., Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969); *Washington Post Co.* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966) (Petitioner's Br. pp. 27-29). As we have shown, the cases have required that *all* evidence pertaining to the defendant's editorial process and methodology be considered and that no single or isolated factor be given overriding dominance (Petitioner's Br. pp. 24-30). When the defendant's editorial process is fully disclosed to the court prior to trial and there is no evidence to prove actual malice with "convincing clarity," the courts have held that summary judgment should be granted to eliminate the "chilling effect" that expensive trials and large verdicts inevitably have upon First Amendment freedoms. *E.g., Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970); *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (S. D. N. Y. 1970).

In the instant case, Time's editorial process in writing and researching the article was fully disclosed at the trial and direction of a verdict against the plaintiff was clearly the correct result. The trial court followed the procedure enunciated in *Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970) for cases that are not disposed of by summary judgment. *Wasserman* delineated a "two-step" procedure: First, at the close of the plaintiff's case, the trial court must decide whether actual malice has been shown with convincing clarity. Second, if the trial is permitted to

proceed, the court must again decide at the close of all the evidence whether actual malice has been proved with convincing clarity. If so, the issue may properly be submitted to the jury. In this two-step process, *both* the trial judge *and* the jury must independently find actual malice before there can be judgment for the plaintiff.

Cases holding that on the peculiar facts and evidence before the court *prior* to trial, the defendant was not entitled to summary judgment are not inconsistent with *Wasserman* or the decision of the trial judge below. *E.g.*, *Time, Inc.* v. *Ragano*, 427 F. 2d 219 (5th Cir. 1970) (cited in Pape's Br. p. 36). The Seventh Circuit's decision, however, is directly contrary to *Wasserman* and Pape does not contend otherwise. The decision should be reversed and the judgment of the trial court reinstated.

Respectfully submitted,

DON H. REUBEN,
LAWRENCE GUNNELS,
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
130 E. Randolph Drive,
Chicago, Illinois 60601,

HAROLD R. MEDINA, JR., ESQ.,
CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York, N. Y. 10005,

Attorneys for Petitioner.

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